No. 2785

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

O. E. GERNERT,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Clarence L. Reames, United States Attorney for Oregon, and John J. Beckman, Assistant United States Attorney, both of Portland, Oregon, Attorneys for Defendant in Error.

Littlefield & Maguire, of Portland, Oregon, Attorneys for Plaintiff in Error.

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

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STATEMENT OF THE CASE.

The plaintiff in error was the assistant sales manager of the United States Cashier Company; he was jointly indicted with Frank Menefee, the president; F. M. LeMonn, the sales manager; B. F. Bonnewell, fiscal agent; H. M. Todd, a sales agent; Oscar A. Campbell, the vice president; Joseph E. Hunter, a sales agent; Otto L. Hopson, a sales agent; P. E. Muraine, a sales agent, and Thomas Bilyeu, a director, all being charged with having entered into a conspiracy to violate section 215 of the penal code by selling the corporate stock of the United States Cashier Company under false and fraudulent representations, with the intent in each of said conspirators to defraud the public.

The defendants Hunter, Muraine and Hopson were not on trial; at the conclusion of all of the testimony the court directed a verdict of not guilty in favor of the defendant Bilyeu; the defendants Menefee, LeMonn, Campbell, Bonnewell, Todd and Gernert were convicted. LeMonn accepted the judgment of the court as final.

Menefee, Campbell, Bonnewell and Todd sued out a

writ of error and their case was heard before this court on May 8, 1916.

The plaintiff in error, O. E. Gernert, has separately sued out a writ of error and presents to this court several of the same assignments of error heretofore presented by Menefee, Todd, Campbell and Bonnewell. Those assignments of error presented by Gernert and not presented by Menefee, Bonnewell, Todd and Campbell are directed against the action of the court in admitting in evidence a letter written by Menefee to Gernert; in admitting in evidence certain overt acts; in denying a request to instruct the jury to return a verdict of not guilty; in denying certain other requested instructions, and in the giving of others.

ARGUMENT.

There are thirty assignments of error.

As these are readily classified into nine groups we will so consider them.

1. ASSIGNMENT OF ERROR NO. 1 is directed against the action of the court in admitting in evidence against the defendant Government's Exhibit No. 293, being a carbon copy of a letter dated at Portland, Oregon, February 10, 1912, addressed to O. E. Gernert, at Portland, Oregon. No mention of this assignment has been made in appellant's brief, and counsel may not rely strongly upon it, but we think it ad-

visable to show the court wherein the exhibit was properly admitted.

It appears from the bill of exceptions (Transcript of Record, pp. 104-146) that evidence had been offered tending to prove that Menefee, LeMonn, Bonnewell, Todd and Campbell were all officers of the United States Cashier Company and had entered into a conspiracy on or about September 1, 1910, to violate section 215 of the criminal code of the United States by using the mails of the United States in furtherance of a scheme to promote fraud in the sale of the capital stock of the United States Cashier Company; that the defendant Gernert was the assistant sales manager of the company from January 1, 1911, until January 1, 1912, (Transcript of Record, p. 106); that on May 16, 1912, the president of the company, Menefee, had written the defendant Gernert a letter detailing certain work which Gernert was to perform (Government's Exhibit No. 66, Transcript of Record, p. 107); that it was the custom of Menefee, as president, and LeMonn, as sales manager, to frequently correspond by letter with the defendant Gernert, is shown by the many letters set out in the bill of exceptions passing between these three men. As to the manner in which the letter in question came into the possession of the government, and as proof of its genuineness, we quote from pages 189 and 190 of the transcript of record:

"By the stenographers who were in the employ of the United States Cashier Company during the time that all of the letters and telegrams mentioned in this bill of exceptions were written and sent, it was proven that it was the habit and custom of the officers of the United States Cashier Company, particularly of the defendants LeMonn and Menefee, to handle the matter of the correspondence in the following manner: A letter would be dictated to the stenographer, who would write the same, whereupon the original would be signed by the writer of the letter and the same would then be deposited in the mail for mailing and delivery, as a part of the custom of the office. The stenographer would then upon the lower left-hand corner of the letter or other instrument in writing, place the initials of the author of the letter, together with the initials of the stenographer who wrote the letter. A carbon copy, which would be an exact copy of the letter without the signature would then be placed in the files of the company as a part of its records. Telegrams were prepared in the same way with the exception that attached to telegrams of which there were to be a number of the same telegram to be transmitted to the several agents there would be a letter to the telegraph company authorizing and directing said company to trans-

mit said telegrams and to charge the same to the account of the United States Cashier Company. Mr. House, expert accountant for the Department of Justice, testified that the defendant Menefee had voluntarily delivered to him before the indictment all of these letters and telegrams and that the witness House had thereupon written upon each of these letters and telegrams his initials so as to be able to identify them. House further testified that at the time the defendant Menefee turned these letters and telegrams over to him, that Menefee then voluntarily told him that these letters and telegrams constituted and were the correspondence of the United States Cashier Company. There was no proof offered by either side which would prove or tend to prove that any of the said letters or telegrams were not genuine."

When the letter in question was offered in evidence the following proceedings occurred: (Transcript of Record, pp. 196, 197.)

> "Thereupon the Government called to the witness stand Myrtle Meadows, who testified among other things that she was a stenographer in the employ of the United States Cashier Company during the latter part of the year 1911 and the early part of 1912, and the witness testified

as to her employers customs in handling their office work as is shown on pages 58 and 59 of this bill of exceptions.

Whereupon the following proceedings were had:

MR. REAMES: I am going to ask you to examine the carbon copy of the letter of date February 10, 1912, and after you have examined it carefully tell the jury if you know who dictated the letter and to whom it was dictated.

A. I believe it was dictated by Frank Menefee and written by myself.

MR. REAMES: The Government will offer in evidence the letter identified by the witness and dated February 10, 1912, marked Government's Exhibit 293.

MR. MAGUIRE: The defendant Gernert objects to this because there is no proof showing he received it or accepted it, or proof that it was a contract entered into. I may state for the information of the District Attorney that this was not entered into and for that reason he objects to it.

MR. REAMES: I do not know if the court feels whether or not this contract was ever entered into. I do know that the proof shows that

under the admission that the carbon copy came from the files of the company and it has been testified to by the witness that she believes it was dictated to her by Mr. Menefee and in the regular course of business the original would have been mailed.

THE COURT: It will be admitted subject to the explanation of the defendant."

The letter is set out in full in the transcript of record at pages 198 to 201, inclusive, and to the action of the court in admitting the letter in evidence, the defendant Gernert asked and was allowed an exception. Attention is directed to the large list of other letters and telegrams passing between Menefee, LeMonn and Gernert set out at pages 260 and 261 of the transcript of record. We fail to find any merit in the objection against the introduction of this letter (Government's Exhibit No. 293); the letter came from the files of the United States Cashier Company accompanied by a voluntary statement made by the defendant Menefee, the president of the company, that it was a part of the correspondence of said company. The stenographer testified that in her opinion it was dictated by Frank Menefee, and that she wrote it; it bears the initials of the president of the company and of the stenographer. There was no evidence offered showing that it was not genuine; there is not even an intimation or an inference

in the record that it was not genuine. As is shown by the instructions of the court, the defendant Gernert did not take the witness stand, therefore he did not in any way deny that the letter was genuine. Inasmuch as the original of the letter, if it had been mailed, would be in the possession of the defendant Gernert to whom it was directed, the government could not produce the said original and it would have been improper for the government, before the jury, to have asked the defendant Gernert to produce it.

The letter shows on its face that there had been before that time an understanding or some sort of tentative arrangement between Menefee and Gernert as to how private stock would be disposed of. The other evidence in the case, which will hereinafter be reviewed in connection with the objection of Gernert that there was no evidence to connect him with the conspiracy, shows that Gernert for some time before the writing of this letter in question had been engaged in the sale of the personal stock of Menefee, LeMonn and himself upon representations that he was selling the treasury stock of the company. Whether or not there was actual proof that Gernert formally accepted the terms of the letter in question, in view of all the other evidence in the case and the contents of the letter itself showing a previous understanding between the writer and the addressee, and in view of the admission of record on the part of the defendants, and the testimony of Miss Meadows, this

letter is made competent as a circumstance to show Gernert's connection with the conspiracy. The admission of this copy of the original letter, as was done in this case, has been held not to be error.

Trent vs. United States, 228 Fed. 648, 650, 651.
McKnight vs. United States, 122 Fed. 926, 929.
United States vs. Greene, 146 Fed. 784, 787, 789.

2. ASSIGNMENTS OF ERROR NO. II AND II-A are directed against the action of the court in admitting the Ovaitt testimony.

These same assignments of error were presented to the court in the same case at the hearing before this court in the case of Menefee, Bonnewell, Todd and Campbell, vs. the United States, which case was heard by this court on May 8, 1916.

True, the assignments of error in the case at bar are presented in a slightly different manner but in the main the same questions are raised.

In our printed brief filed in the Menefee case (a copy of which has been served upon counsel for plaintiff in error herein) at pages 47 to 80 thereof, we fully stated our position in regard to these assignments of error, both as to the law and the fact and no good purpose could be served by reprinting that argument at this time.

We might add, however, that in the event this court, after a consideration of what we have to say hereafter in

reference to those assignments of error dealing with the sufficiency of the evidence, is of the opinion that Gernert was a member of the conspiracy, then it would necessarily follow that the Ovaitt testimony, if admissible at all would also be admissible as against him.

3. ASSIGNMENT OF ERROR NO. III is directed against the action of the court in admitting the proof of the overt acts, the proceedings in this connection being fully set out at page 128 of the transcript of record as follows:

> "And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee, and F. M. LeMonn committed each, every and all of the overt acts that are mentioned, specified and stated in the indictment in the manner and at the several times and places respectively alleged and stated in said indictment."

And at pages 261 to 268 of the transcript of record, at which last mentioned pages of the record, it is shown that the several overt acts were offered in evidence.

We preface our argument upon this assignment with the assumption that this court will be of the conclusion and will hold that Gernert was a member of the conspiracy.

As shown by the record hereinbefore cited at the time evidence of the overt acts was offered, counsel for Gernert asked the United States Attorney whether he elected to prosecute for a violation of section 37 of the penal code or a violation of section 215 of the penal code; to which the United States Attorney replied that the indictment was for a violation of section 37; the United States Attorney then responded in the affirmative to a second question propounded by counsel for Gernert to the effect that the various overt acts set out in the indictment were the overt acts referring to and in pursuance of the particular conspiracy set out in the indictment. To a third question propounded to the United States Attorney by counsel for Gernert the United States Attorney responded that it was his contention that these letters were written and mailed in the United States mail and that the government claimed it to be proven by circumstantial evidence that these letters and various exhibits, being exhibits numbered 120 to 272, inclusive, (Trans. of Record, p. 263) had been mailed in the United States mail in the ordinary course of business and related and referred to the particular conspiracy set out in the indictment, and that the United States Attorney thought they were in execution of that particular conspiracy.

As we understand the position of counsel for the plaintiff in error, there is no contention but what the

letters were sufficiently identified and that competent proof was offered tending to show that said overt acts and each, every and all thereof were mailed by the respective conspirators in pursuance of the conspiracy and at the several times and places designated in the indictment.

We also understand that counsel for plaintiff in error contends that by the statement of the United States Attorney herein above referred to that the United States Attorney thus took the position in open court that more than three years prior to the date of the indictment two of the conspirators had, in execution of the scheme to defraud, as it is charged in the indictment, mailed certain letters, from which admission and statement it is the position of counsel for plaintiff in error that the United States Attorney has admitted such a state of facts as will conclusively show that the alleged scheme to defraud was fully executed prior to February 27, 1912, and thus, being completed, is barred by the statute of limitations.

We might suggest in beginning the discussion of this phase of the case that while the questions propounded to the United States Attorney were manifestly ingeniously worded so as to entrap him into making an admission which counsel for the appellant believed would be fatal to his case, that the record hereinabove quoted does not

go to the extent claimed for it by counsel for plaintiff in error.

But for the purpose of the argument, assuming that the United States Attorney did admit in open court that certain letters in execution of the scheme to defraud alleged in the indictment were mailed by the several conspirators prior to February 27, 1912, still, it is our contention that this admission would not establish the fact either that the crime had been fully consummated prior to February 27, 1912, or that the action was in any way barred by the statute of limitations.

The indictment alleged (Transcript of Record, p. 28) and the proof showed (Transcript of Record, p. 125) that the conspiracy was to be a continuing conspiracy and that it was to and did continue at all times between September 1, 1910, until and including January 1, 1915, and that at and during all of the said times and dates the conspirators would and did continue to be parties to said conspiracy and would and did continue to commit the said acts and crimes hereinbefore set forth in detail.

The charge and the proof thus showing a continuing conspiracy we contend that the crime would not be barred because a letter was mailed either in execution or furtherance of the scheme to defraud or in pursuance of the conspiracy prior to February 27, 1912.

If the rule of law should be different, then it would

be possible for men to enter into a gigantic conspiracy to defraud the public by use of the mails of the United States, reduce their illegal and fraudulent conspiracy agreement to writing, sign and execute the same before witnesses so that the date of the conspiracy would be fixed, thereafter and on the same day cause a letter to be mailed in execution of the scheme to defraud which they had conspired to devise and execute, sit down calmly and wait three years from the date of the mailing of said letter and then proceed to swindle, fleece and defraud the public out of millions of dollars in accordance with the terms of their original fraudulent conspiracy contract, and then when confronted with indictment and proof charging a continuing conspiracy absolutely escape all punishment and claim absolute immunity from further prosecution by showing that the scheme to defraud which they had so conspired together to devise and execute was barred by the statute of limitations, because, forsooth, a letter mailed in execution of the scheme had been mailed prior to the expiration of three years from the date of the filing of the indictment.

The burden of the contention of counsel for Gernert in argument of this assignment of error is that, inasmuch as the defendants are charged with having conspired to violate section 215 of the Penal Code, the offense charged was consummated the very instant that a letter was placed in or taken out of the mails in furtherance of the conspiracy, and that while it may be true

that a conspiracy to defraud the government could be a continuing conspiracy, yet, by the very nature of the crime, a conspiracy to use the mails to defraud could not be continuous, because the mailing of a single letter would complete the object of the conspiracy. Counsel fails to distinguish between a conspiracy to commit the acts made offenses by section 215 and the violation of that section itself. The gist of section 215 is the mailing of a letter in execution of a fraudulent scheme. The mailing of each letter would constitute a separate offense. In the prosecution for violation of section 37 Penal Code the unlawful agreement or conspiracy itself is of prime importance and really the offense made punishable by the statute, the overt acts only being necessary to make the unlawful agreement a crime and to afford jurisdiction.

Hyde vs. U. S., 225 U. S. 347.

A conspiracy is a partnership in criminal purposes, and as such may have continuation in time.

U. S. vs. Kissel, 218 U. S. 601, 608.

As stated above, the indictment charges that the conspiracy on the part of defendants, to commit acts made offenses by the laws of the United States, was to, and did, continue from 1910 to 1915. There was only one conspiracy alleged in the indictment, and it was proven to have continued for the length of time alleged. An overt act, consisting of the mailing of a letter, while it

may have completed the violation of section 215 Penal Code, did not necessarily effect the object of the conspiracy, or rather complete and terminate it, because it was alleged and proved that this conspiracy was to, and did, continue from 1910 to 1915. Counsel for plaintiff in error draws the conclusion that if the mailing of a single letter is a separate and distinct offense against section 215, that an agreement to commit such an offense is a violation of section 37 Penal Code, and that the defendants could be prosecuted for an offense for each time they mailed or received a letter, and that a count for conspiracy could lie upon each letter so sent or received. In other words, counsel claims that the indictment is duplicitous because 16 overt acts are alleged in one count. Counsel's contentions in this behalf are not supported by the authorities.

Stanley vs. U. S., 195 Fed. 896 (C. C. A. 8th Cir.)

In this case the defendants were indicted for conspiring to violate section 5480 R. S., that is, with conspiring to defraud by use of the mails. It was there contended that the conspiracy was a completed offense when the first overt act in pursuance of the conspiracy was committed, and, as more than one overt act was alleged, several offenses were charged. The court in this connection said:

> "The crime consists in the conspiracy to commit the offense. The overt act is no part of the

offense of conspiracy, as was said in Ware vs. United States, 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233;

'The offense under section 5440 is the conspiracy, not the conspiracy and the overt act.'

Or, as said in United States vs. Britton, 108 U. S. 199-204, 2 Sup. Ct. 531, 534 (27 L. Ed. 698);

'This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy merely affords a locus penitentiae, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.'

The conspiracy is a continuing one so long as overt acts are committed in furtherance thereof. United States vs. Kissel, 218 U. S. 601-607, 31 Sup. Ct. 124, 54 L. Ed. 1168. It therefore follows that the charging in a single count of the indictment for conspiracy of more than one separate and distinct overt act is not charging separate and distinct offenses."

The case of Brown vs. Elliott, 225 *U. S.*, 392, 400,

completely establishes the error of appellant's contentions, that the conspiracy here alleged may not have continuity. This was a case where defendants were indicted for conspiring to violate the mail fraud statute. The conspiracy was alleged to be a continuing one, and the court, in passing upon the indictment, held that such a conspiracy might continue in existence and in the process of execution and operation any length of time. The court said:

> "If, however, we assume with appellants that the indictment charges that the conspiracy was formed in 1905 and at a place unknown to the grand jurors, the same result must be pronounced, upon the authority of Hyde vs. The United States, just decided, ante, p. 347. We there held that the place of trial could be any State and district where an overt act was performed. And we further held, following United States vs. Kissel, 218 U. S. 601, that conspiracy might be a continuous crime. We there said, distinguishing a crime from its results: 'But when the plot contemplates bringing to pass a continuing result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies,

rather than to call it a single one.' These remarks are especially pertinent to the case at bar. It is alleged in the indictment that the conspiracy set forth was designed to be and was continuous, and, being so, every overt act was the act of all the conspirators, made so by the terms and force of their unlawful plot."

See also U. S. vs. Eccles, 181 Fed. 906;

Breese vs. U. S., 203 Fed. 824, 830;
U. S. vs. Rogers, 226 Fed. 512;
Houston vs. U. S., 217 Fed. 852, 858.

The cases cited by appellant in support of his argument in this connection are not applicable.

In re Henry, 123 *U. S.* 372

was concerning an indictment for using the mails to defraud.

Francis vs. U. S., 152 *Fed.* 155

is clearly distinguishable from the case at bar. This was an appeal from a conviction on an indictment for conspiring to use the mails to defraud, but there was no allegation or proof in that case that the conspiracy was a continuous one, as far as the opinion of the court shows.

Each count of the indictment was manifestly drawn on the theory of a separate conspiracy in connection with each overt act. This case does not hold that there

can not be a continuing conspiracy to violate the mail fraud statute. Even if it did, it would be in contravention of the ruling of the Supreme Court in the case of Brown vs. Elliott, supra.

The legal proposition quoted by counsel from U. S. vs. Ehrgott, 182 Fed. 267, 273 is correct as far as it goes, but this case has no application to the facts in the case at bar.

Lonabaugh vs. U. S., 179 *Fed.* 476.

This case also concerned a conspiracy to violate the mail fraud statute, but there was no allegation or proof there of a continuing conspiracy, as far as a reading of the opinion shows.

U. S. vs. Burke, 218 *Fed.* 83.

A further reading of this case at page 84 supports our views of the law.

Ex parte Black, 147 *Fed.* 832.

This was a nisi prius case, and has been held not to be according to the weight of authority. See Breese vs. U. S., 203 Fed. 824, 830.

4. ASSIGNMENT OF ERROR NO. IV is directed against the action of the court in refusing to instruct the jury to return a verdict of not guilty, for the reason that the indictment does not state facts sufficient to constitute a crime.

In our opinion the indictment charges every element of the offense, and at this time we have no suggestion from counsel for the appellants as to what argument, if any, is to be advanced to support this assignment. There was no demurrer filed to the indictment and the question first arose upon the motion for a directed verdict.

5. ASSIGNMENT OF ERROR NO. V is directed against the action of the court in denying the motion of the defendant Gernert to direct a verdict of not guilty for the reason that the indictment charges more than one crime. This objection was made for the first time formally upon the motion for a directed verdict. This assignment is probably directed to the plurality of overt acts in one count. We have touched upon this question in our argument herein under assignment No. III. There is no merit in this contention.

See

Stanley vs. U. S., 195 Fed., 896;
U. S. vs. Eccles, 181 Fed. 906.

6. ASSIGNMENTS OF ERROR NO. VI AND VII present for consideration what we consider the only question involved, viz., whether or not the evidence was sufficient to sustain the verdict.

There was evidence tending to prove each, every and all of the following facts:

(i) The United States Cashier Company was a

corporation with its place of business in Portland, Oregon. (Transcript of Record, pp. 105, 106).

(ii) During practically all of the times mentioned in the indictment Menefee was a director, the president, and general manager of said corporation; during said periods LeMonn was the sales manager; from January 1, 1911, until January 1, 1912, Gernert was an agent and salesman of the company (Transcript of Record pp. 106, 107); and while there was testimony to the effect that Gernert was not assistant sales manager after December 31, 1911. (Transcript of Record, p. 106.) Government's Exhibit No. 66 (Transcript of Record, p. 107) clearly proves that Gernert was working in the capacity of salesman as late as May 16, 1912. President Menefee testified (Transcript of Record, p. 274) that Gernert did not do any work *particularly* for the company after January 1, 1912; that during practically all of the times mentioned in the indictment Bonnewell was the fiscal agent and an agent and salesman for the corporation, and that during said times Todd, Hunter, Hopson and Muraine were sales agents of said corporation (Transcript of Record, p. 113); that during said times Campbell was a director, and the vice president of said corporation, and that between June 9, 1913, and January 31, 1914, Bilyeu was a director of the corporation; (Transcript of Record, pp. 113, 114.)

(iii) That the capital stock amounted to the sum

of $1,200,000, segregated into 120,000 shares of the par value of $10.00 each;

(iv) That at Portland, Oregon, and on or about September 1, 1910, Menefee, LeMonn, Bonnewell, Todd and Campbell conspired together to violate section 215 of the penal code by fraudulently, and by false representations to sell the capital stock of said corporation, to be effected by means of the postoffice establishment of the United States. (Transcript of Record, pp. 114, 115.)

(v) That it was a part of the conspiracy that more than $1,000,000 was to be collected from the public on account of said false representations and the public was to be defrauded out of all of said money. (Transcript of Record, pp. 115, 116).

(vi) It was a part of the conspiracy that false representations were to be made relative to the ownership of certain patents (Transcript of Record, pp. 116, 117).

(vii) It was a part of the conspiracy to falsely represent that the corporation was the owner of bona fide orders for the purchase of machines; that the financial condition of the corporation was excellent and the assets exceeded the liabilities; that stock offered for sale was the property of the corporation and that the money derived from the sale was to be by said corporation invested so as to increase the assets of said corporation; that on account of the said splendid financial condition

of the corporation it was justifiable to periodically raise the selling price of the stock from $10.00 per share to $50.00 per share. (Transcript of Record, p. 118); that in truth and in fact each, every and all of said representations, as the said conspirators well knew, were false, untrue and fraudulent (Transcript of Record, pp. 119-122).

(viii) That it was a further part of the conspiracy that false and untrue written and printed statements of the assets and liabilities of the corporation were to be published; that the scheme and artifice to defraud was to be carried out in many states in the Union (Transcript of Record, pp. 122, 123).

(ix) That the conspiracy should, would and did continue from September 1, 1910, until January 1, 1915, (Transcript of Record, p. 125). It was also proven that it was the custom of Menefee, acting as president, and LeMonn, acting as sales manager, to send letters and telegrams to agents of the company advising said agents the price of the stock was about to be raised; all this for the purpose of hurrying prospective purchasers into making a purchase of the stock (Transcript of Record, p. 126); that it was a habitual custom of said Menefee, LeMonn and said agents in the field to follow this practice in inducing purchasers to invest (Transcript of Record, p. 126); that frequently the agents would request that these boosting letters be sent them, and Men-

efee and LeMonn would comply with this request as a matter of custom (Transcript of Record, pp. 126, 127); that Menefee and LeMonn caused to be created a board of advisers for the purpose of deceiving the public (Transcript of Record, p. 127); that these members of the so-called advisory board received special contracts fraudulently promising earlier dividends than the other holders of the stock would receive (Transcript of Record, p. 127); that Gernert took no part in the sending of said letters or telegrams or the creation of the advisory board or the issuance of the preference contracts and had no knowledge of any of said things other than shown in the bill of exceptions (Transcript of Record, p. 128).

(x) That each, every and all of the overt acts alleged in the indictment were committed at the several times and places alleged and stated in the indictment and in pursuance of the conspiracy and to effect the object thereof (Transcript of Record, p. 128).

(xi) There was evidence tending to prove that in three papers, each having a circulation of more than 25,000 subscribers, served by the agency of the mail, Menefee and LeMonn inserted advertisements of the United States Cashier Company displaying the names of LeMonn, Menefee, Campbell, Bonnewell, Todd, Bilyeu, and Gernert, as officers of the corporation (Transcript of Record, pp. 128, 129). These advertisements

are set out and displayed in the transcript of record at pages 129 to 142, inclusive.

(xii) There was testimony tending to prove that the company received on account of the sales of its capital stock, in cash, $760,165.00 and disbursed over $400,000 to its agents as commission upon the sale of its said capital stock; that LeMonn received ten per cent commission; Menefee received ten per cent commission; that the agent making the sale received thirty per cent commission; making in all a total commission upon each sale of capital stock of fifty per cent; (Transcript of Record, p. 145); that approximately $1,500,000 in cash and property were paid to the United States Cashier Company during the continuance of the conspiracy on account of said sales of said capital stock (Transcript of Record, p. 146); that nothing of value was returned to the public in exchange for said money and property and that Menefee, LeMonn, Campbell, Bonnewell and Todd received large sums of money and made large profits by selling and disposing of their own personal stock (Transcript of Record, pp. 145, 146).

It is certified in the bill of exceptions (Transcript of Record, pp. 146, 147, 148) that there was no testimony received at the trial which tended to prove that Gernert had any knowledge or information of the swindle other than is set out in the bill of exceptions; we now pass to a consideration of that evidence which directly involves the defendant Gernert.

(1) It appears from the twelve propositions of fact stated above that there was a conspiracy existing between Menefee, LeMonn, Bonnewell, Todd and Campbell, which continued from September 1, 1910, until January 1, 1915; it is fairly inferable from the said propositions of fact that this conspiracy was proven by evidence consisting of oral testimony, written letters and telegrams which actually proved that the said conspirators had performed the things which they conspired to do; it is fairly inferable from said above twelve propositions of fact that this was a conspiracy of such magnitude and such duration that Gernert could hardly have acted as assistant sales manager of the company without knowledge of the fraud; it is fairly inferable from the above twelve propositions of fact that Gernert acted as assistant sales manager until April 1, 1912.

(2) It was shown by the testimony of Mr. Menefee (Transcript of Record, pp. 273, 274) that Gernert was with the company before Menefee became manager; that Gernert knew about the selling and the field work pretty well; that he was the man depended on for the field work and in training other salesmen, but that he was assistant sales manager purely in the field and in outside ways and had nothing to do with the inside work or the office.

(3) There was evidence tending to prove that each, every and all of the advertisements containing the false advertising matter set out and detailed at pages 129 to 142, inclusive, of the Transcript of Record, bore the

name of O. E. Gernert as one of the officers of the United States Cashier Company.

(4) It was proven by the testimony of C. B. Clark (Transcript of Record, pp. 149-163) that Gernert represented himself as assistant sales manager of the United States Cashier Company; that Gernert sold Clark a third interest in one thousand shares of stock at the price of $25.00 per share under representations that the money was to be paid into the treasury of the company, and that the witness and Gernert and another were to receive a machine agency in consideration of said purchase; that Gernert wrote the witness the letter marked as Government's exhibit No. 242; that Menefee subsequently told the witness that the stock he had purchased was Mr. Gernert's private stock, for which reason the witness could not get the agency; that in completing the transaction the witness had given Gernert a $2500.00 mortgage upon his property which still remains a lien thereon.

(5) It was proven that the stock obtained by the witness Clark was transferred from a certificate which stood in the name of Frank Menefee, Trustee, (Transcript of Record, p. 165); and that no part or portion of this sum of $2500.00 ever went into the treasury of the company (Transcript of Record, p. 166).

(6) By Government's exhibit No. 290, being a letter of date December 5, 1911, written to Gernert by Menefee (Transcript of Record, pp. 166, 167) Gernert

is advised that in eleven instances in which he has sold stock that the stock is the privately owned stock of Menefee, and that when settlement is made Menefee and Gernert are to get together and divide.

(7) By Government's exhibit No. 292, being a letter of date December 9, 1911, written by Menefee to Gernert (Transcript of Record, p. 168) Gernert is advised that the witness Clark has received the personal stock of Menefee; the contract between Menefee and Gernert is explained and the further statement is made that Agent Muraine had been given to understand that none of the stock of Mr. Gernert is to be put in on the deal and that as to this feature Agent Muraine has been purposely misled.

(8) In Government's exhibit No. 291, being a letter written by Gernert to Menefee of date December 14, 1911 (Trans. of Rec., p. 170), upon letterhead bearing the name of Gernert as assistant sales manager, receipt is acknowledged of two letters written by Menefee of date December 5, and December 9, 1911; a close interest and association in the business are shown and a detailed report of all business done is promised; the statement is made that Gernert expects to see his $75.00 as salary credited each week notwithstanding the fact that it appears that Gernert was then absent on a private stock deal between himself and Menefee; the letter evinces surprise that Agent Muraine should know of the private stock deal.

(9) Government's exhibit No. 288 (Transcript of Record, p. 173) is a letter written by Gernert to defendant LeMonn of date February 27, 1912. We quote it verbatim:

"THE STOCKTON

Stockton, Cal., 2/24

My Dear LeMonn:

I have yours of the 27th. As to this country give me two inches of rain and I'll come home with forty feet of gold. What is Amsden doing in Sacramento, he is hiring men posing as fiscal ag't. A fellow by the name of Nathan was in Lodi last week with a street car machine. Some one was in Stockton this week. I am working Tracy, wired you today asking for list of stockholders & especially Cal. & S. Francisco holders.

I believe I will do business with the Tracy bank, directors et all. I told them I had 35000 to sell & if I sold it all in their community the Co would permit one man to seat on the advisory board & see that everything is taken up legitimately. They are to have another special meeting at which my presence will be required at which time I must have stockholders list and statement. Show up cash & notes in one item.

Write me a personal letter and tell me you will do all in your power to help me get that 1000

machines I ask for, for my territory. Also say in a joking way that you never knew there were so many banks in the country, as the letters show which are coming in daily asking about machines. Also state that one of the directors stated at luncheon the other day that they are figuring to keep the wheels running 24 hrs a day 3-8 hr shifts in order to supply the great demand which *I* know there is for our new born toy.

Also state that the other *two* agencies are almost through with the stock selling & if I want to let them have what I got to sell to let you know as they want it, but personally you wouldn't do it as it would mean that I would have to lay *ideal* for a month or two until the machines are ready.

I am feeling fine physically & seem to be sound mentally, its only once in a while I get bugs.

Yours mit lof

Gernert.

P. S. I hocked my sparkler to-day in order to save myself from being knocked down, theres so many holdups these days.

(10) Government's exhibit No. 289 (Transcript of Record, pp. 175, 176) is the answer of LeMonn to the above quoted letter:

"March 2, 1912

Mr. O. E. Gernert,
Stockton, Calif.

My dear Gernert:

I have your favor of the 27th, and have carefully noted contents of same, and beg to advise that Mr. Amsden has reported at this office this afternoon and is not leaving anyone working in California.

We are today sending you a partial list of stockholders in California, as the entire list was eight pages long, together with financial statement as shown by our books February 1, 1912.

We will be only too pleased to have a member on the Advisory Board from that section of California providing they sell $35,000 worth of stock allotted to you, as then they would have a sufficient investment to take a deep personal interest in advising with us as to plans of manufacturing and selling.

You may count upon me using my personal influence in giving you all the possible support toward providing you with 1000 machines which you have requested for your territory. You would really be surprised at the number of unsolicited orders that are coming in from almost every quarter, and it has been a very agreeable surprise to

the writer, as I had no idea there were that many banks and paymasters in the country.

You may be interested to know that the Board of Directors have decided to have the factory work overtime and we are figuring on getting the factory on three shifts of eight hours each, which means that they will have to work twenty-four hours a day if the orders keep on coming, in order to supply the great demand, which we are assured for this new device, our Automatic Cashier.

Just a word to advise you that the other two fiscal agents have almost sold their entire allotment and want to know if we can supply them with another block which means, if we are to do this, that we get same from you and want you to advise us by return mail if you are willing to release any part of your block and turn it over to them. In fact, I think they would give you a small premium if you would do so. Just bear in mind that we are not asking you to do this as it would mean that you and your men would have to remain idle for at least thirty or sixty days until we could supply you with enough machines to keep your men busy.

It may interest you to know that a week ago I saw the first Standard Commercial Automatic Cashier demonstrated and in action and watched

it work for a period of thirty minutes without it making a symbol of an error, and I believe that this demonstration proved one fact: That it is the first time in the history of the world that any machine ever made three automatic visible records of a transaction, two of which were permanent, one on the endless tape and the other on the check itself and these, together with the visible total which is always before you, constituted these three records. Besides these three records, we had two others, one when the keys were depressed, and as you know remain down until the machine is operated, and the other the money which was paid from the machine automatically.

We have been very enthusiastic after this demonstration and are absolutely satisfied that these machines will revolutionize the present systems of handling money and prove to be one of the greatest of modern inventions.

Am glad to know that you are feeling yourself again and wishing you continued success, beg to remain,

Yours very truly,

FML:E SALES-MANAGER."

These two letters plainly and conclusively show Gernert's connection with the conspiracy and his perfect working understanding with LeMonn, one of the

mainsprings of the conspiracy, in doing just what the indictment alleged the conspirators were to do. Gernert's knowledge of the fraud is here shown too plainly for comment.

(11) Government's exhibit No. 294 is a letter written by LeMonn of date March 2, 1912, to Gernert (Transcript of Record, p. 178) in which the close connection between Gernert and LeMonn is clearly shown.

(12) Government's exhibit No. 295, is a letter written by LeMonn to Gernert of date March 23, 1912, (Transcript of Record, p. 180) in which the connection between LeMonn and Gernert is so clearly shown as to need no comment whatsoever.

(13) Government's exhibit No. 440 (Transcript of Record, p. 185) is a letter written by LeMonn and Gernert of date March 12, 1912, in which the connection between LeMonn and Gernert seems to us to be demonstrated.

(14) The evidence set out at pages 189 to 196, of the transcript of record, and the many telegrams therein shown, all show a close working connection between LeMonn, Gernert and Menefee, and that boosting telegrams were frequently sent to Gernert which were to be shown by Gernert to the public for the purpose of deceiving the public into the purchase of the shares of stock of the corporation.

(15) Government's exhibit No. 293, being a letter written by Menefee to Gernert of date February 10, 1912, (Transcript of Record, p. 198) explains in detail the contract between LeMonn, Gernert and Menefee.

(16) By the witness Lew Paramore (Transcript of Record, pp. 201-213) it was proven that at Snohomish, Washington, on December 2, 1911, Gernert sold the witness fifty shares of United States Cashier stock at $20.00 per share, making a total consideration of $1,000, the witness giving to Gernert his promissory note for $1,000 of date December 2, 1911, due five years after date; that this stock was bought on account of the direct representation made by Gernert to the witness that the stock was treasury stock of the United States Cashier Company; that it was being sold to pay off the indebtedness of the company and that the proceeds were to go into the treasury of the company, and that the Cashier Company owned the patents to its machines; that the Railroad Companies were already using the machines of the Cashier Company and they were going to be put upon the streetcars at a daily rental; that this rental would pay the company $150,000 per year. The witness further testified that he bought this stock upon these direct representations of Mr. Gernert. It is true that the witness was an old man and that he became slightly confused upon his cross examination. However, the above statements made by the witness bear every evidence of verity. The witness further testified

that Gernert at the time of the sale claimed to be representing the United States Cashier Company as its assistant sales manager. The note given by the witness to Gernert is secured by a mortgage upon the property of the witness, and this mortgage still remains as a lien upon the property.

By the testimony of Mr. House (Transcript of Record, p. 213) it was proven that Mr. Paramore received certificate of stock 2729 of date December 6, 1911, for fifty shares and that this stock was issued from a certificate which stood in the name of Frank Menefee; that the company received no benefit from this transaction; note the statement made in the letter written to Gernert by Menefee (Government's exhibit No. 290, date December 5, 1911, Transcript of Record, p. 166) that the shares of stock were enclosed in this letter to Gernert with the statement that they would be taken care of out of the Menefee personal stock and that subsequently Gernert and Menefee were to get together and divide.

(17) By the testimony of J. W. Zufall (Transcript of Record, p. 214-216) it was proven that on November 18, 1911, witness purchased ten shares of stock from an agent of the company at $20.00 per share; that he paid $100 in cash at the time of the purchase; that subsequently he paid $50.00 more and gave a note for the other $50.00; this note was made payable to O. E. Gernert and was delivered personally to Mr. Gernert by

the witness; the note was paid at maturity; that Mr. Gernert, at the time, said he was representing the United States Cashier Company. By the testimony of Mr. House (Transcript of Record, pp. 219, 220) it was proven that certificate of stock 2722 issued to J. W. Zufall December 6, 1911, for ten shares, and that this was transferred from a certificate standing in the name of Frank Menefee; that the United States Cashier Company received no benefit from this transaction.

(18) By the testimony of G. H. Moore (Transcript of Record, p. 216) it was proven that in December, 1911, the witness purchased some stock of the United States Cashier Company upon the solicitation of agent Muraine, one of the defendants in this case, and the same man who is mentioned in Government's exhibit No. 290 (Transcript of Record, p. 166), as working with Gernert; the same man who is mentioned in Government's Exhibit No. 299 (Transcript of Record, p. 169) as the agent who was deceived relative to the private stock deal and the same man and agent mentioned in the letter written by Gernert to Menefee of date December 14, 1911, Gov. Ex. 291 (Transcript of Record, p. 170) as not knowing anything of the private stock deal between Menefee and Gernert. It is fairly inferable from the above testimony and exhibits that Gernert and Muraine were working together in the sale of stock; that a private arrangement was in existence between Menefee and Gernert to the effect that their own per-

sonal stock should be sold instead of treasury stock, but that the defendant Muraine who was assisting in the sales was not let in on the secret.

It was further proven by the testimony of this witness that the representations made to him by Muraine were also made to other purchasers at approximately the same time in the hearing of the witness by the defendant Gernert; it was proven by the testimony of Mr. House (Transcript of Record, p. 219) that Mr. Moore, on December 26, 1911, received certificate of stock 2727 which was transferred from a certificate standing in the name of Frank Menefee, the United States Cashier Company receiving no benefit from this transaction.

(20) By the testimony of W. A. Decker (Transcript of Record, pp. 220-224) it was proven that the witness purchased stock in the United States Cashier Company from Agent Muraine; that he bought five shares for $20.00 a share, and that the representations were that the money was to go into the treasury of the company for the purpose of equipping the factory.

By the testimony of Mr. House it was proven that on December 6, 1911, five shares of stock were issued to W. A. Decker, transferred from a certificate which stood in the name of Frank Menefee, and that no part of this money went into the treasury of the company in payment for the stock.

The witness Decker is the same stockholder whose

stock was forwarded to Gernert by Menefee under representations contained in the letter of date December 5, 1911, being Government's exhibit No. 290 (Transcript of Record, p. 166).

(21) By the testimony of Dr. C. R. Zener (Transcript of Record, pp. 224, 225) it was proven that the witness purchased stock in the United States Cashier Company from agent Muraine; that he purchased twenty-five shares at $20.00 per share, giving two notes for the stock; that representations were made that the money was to be used for the purpose of financing the building of a factory and installing machines; by Government's exhibit No. 297 it was proven that Menefee, not personally, but as president of the company, officially acknowledged the receipt of $50.00 to apply upon a note given for the purchase of this stock; by the testimony of Mr. House (Transcript of Record, p. 226) it was proven that on December 6, 1911, certificate of stock No. 2721 was issued to Dr. C. R. Zener for twenty-five shares; that this was transferred from the private stock standing in the name of Frank Menefee; no part or portion of the money that was paid going into the treasury of the company. The witness Zener is evidently the same man mentioned in the letter of date December 5, 1911, written by Menefee to Gernert transmitting twenty-five shares of stock to Gernert upon the account of "C. R. Yener" (Transcript of Record, p. 166).

(21) By the testimony of Mrs. Ollie B. Howard, (Transcript of Record, pp. 228-231) it was proven that in May, 1913, the witness had a conversation with the defendant Gernert in which he said that he had been employed by the United States Cashier Company, had traded his stock for $100,000 in property and received a large sum in cash; that in order to interest prospective customers they were "wined and dined" and when under the influence of liquor they would be persuaded and induced to purchase stock. This testimony was rather weakened by the affidavit set out at pages 229 and 230 of the Transcript of Record, but the witness testified (Transcript of Record, p. 231), that the affidavit had been prepared by Gernert and that she had signed it without reading it and had been deceived thereby. After all, the question of the credibility of the witness was a question of fact for the jury.

(22) By the testimony of C. F. L. Smith (Transcript of Record, pp. 231 and 232) it was proven that in the latter part of the year 1911 the witness had purchased stock from an agent of the company and had talked about the purchase in the demonstration rooms of the company with Mr. Gernert; that Gernert told him that the stock would raise to $100.00 per share within a year.

(23) By the testimony of Harry Wainwright (Transcript of Record, pp. 232-238) it was proven that

Gernert had assisted in the sale of stock to the witness upon the representations that dividends would probably be paid by the year 1912; that the company was manuacturing five machines and that the machine was patented in this and other countries.

(24) By the testimony of Elmer C. Townsend (Transcript of Record, p. 239) it was proven that at Vancouver, Washington, in October, 1911, the witness purchased twenty-five shares of stock at $15.00 per share from agent Muraine; that the witness gave Gernert a mortgage upon real property for the payment of the stock and finally gave Gernert a deed to the realty in payment for the stock; it was proven by the testimony of Mr. House (Transcript of Record, p. 239) that Townsend received twenty-five shares of stock transferred from a certificate which stood in the name of O. E. Gernert, no part of the money that was paid going into the treasury of the company and the company receiving no benefit on account of this transaction.

(25) It was stipulated between the government and the defendant Gernert (Transcript of Record, p. 164) that the books and records of the United States Cashier Company had been correctly kept and that they correctly, accurately and truthfully showed the financial transactions of the United States Cashier Company and that all entries appearing therein are true, correct and accurate records and entries (Transcript of Record, p. 164).

(26) It was proven by the testimony of Mr. House that,

"The records of the company show that on December 30, 1911, a credit was made to Mr. Gernert's account on the books of the United States Cashier Company for $375.00, with the notation that it is for salary and expenses for five weeks from November 25, 1911, to December 30, 1911. Said records further show that on January 4, 1912, the company paid Gernert $83.34 in cash. On January 12, 1912, ($250.00 in cash. On February 5, 1912, $25.00 in cash. On February 8, 1912, $75.00 in cash. On February 10, 1912, $150.00 in cash. On April 11, 1912, $100.00 in cash. On May 8, 1912, $100.00 in cash. On May 25, 1912, $100.00 in cash. On June 11, 1912, $50.00 in cash. On July 2, 1912, $50.00 in cash. Making a total payment in cash of $983.34, subsequent to December 30, 1911. Mr. Gernert's account was credited with $513.60 on account of commissions. This would make a payment to Mr. Gernert of $469.74 more than his commissions. In compiling these figures I have not taken into consideration any commission that Mr. Gernert might have made from the sale of private stock; the records of the company further show that the company has paid to Mr. Gernert in cash a total of $8170.56 during the years 1910,

1911 and 1912; that the account was opened about the 1st of April, 1910. In these figures I am not taking into consideration any sums of money or any property that Mr. Gernert may have received on account of the sale of any personal stock either belonging to himself or anybody else, and these figures are exclusive of all amounts that Mr. Gernert may have received as commissions on the sale of private stock. In reference to the statements made in Government's Exhibit No. 295, being a letter from LeMonn to Gernert, the books and records of the United States Cashier Company show that on February 10, 1912, the company paid to Mr. Gernert $150.00; the next date, February 21, 1912, $250.00, does not appear on the company's books; the only payment mentioned in said letter which appears upon the company's books is the first entry of date February 10, 1912, for $150.00. The books and records of the United States Cashier Company further show that at this time Mr. Gernert is indebted to the company in the amount of $1439.27. The last entry made in the account was on the 28th day of February, 1913, being a credit for seventy-five cents commission.

Cross examination by Mr. Maguire.

The payments that were made in February,

March, April, May and June to Mr. Gernert were advances to Mr. Gernert. During this time there were credit commissions that were made to him. These were commissions for stock that had been sold prior to February, 1912. The commission would not be credited until the stock was paid for, notwithstanding the date of the sale." (Transcript of Record, pp. 226-228).

(27) The Government exhibits listed at pages 260 to 261, inclusive, of the transcript of record show a close working arrangement between Gernert and the officers of the United States Cashier Company.

Against all of this positive testimony appearing in propositions of fact numbered (i) to (xii), inclusive, appearing at pages 21 to 26 of this brief, and showing that a conspiracy existed and the extent thereof; against all of the testimony as shown in the above propositions of fact numbered (1) to (27), inclusive, set out at pages 27 to 45 of this brief showing the connection of Gernert with said conspiracy, there is no evidence in the record to explain or modify these facts except the testimony of Mr. Menefee (Transcript of Record, pp. 269-277), to the effect that Gernert was hopeful of being able to eventually obtain a contract for the sale of the machines of the company, and to the effect that Gernert was an outside man rather than an office man and had nothing to do with the management of the company; and the

statements contained in the bill of exceptions, many times repeated, to the effect that the evidence shown in the bill of exceptions was the only evidence offered that connected Gernert with the conspiracy.

That there was a gigantic conspiracy between Menefee, Todd, Campbell, LeMonn and Bonnewell, is certified in the bill of exceptions with explicit detail. The only question that we have to settle upon this branch of the case is whether or not under the law Gernert was a party to that conspiracy.

Keeping in mind, then, the above propositions of fact, and applying to them the principles of law that should govern, we confidently assert that under the law the evidence was sufficient to establish that the defendant Gernert was a member of the conspiracy and should be bound thereby.

In relation to the above mentioned propositions of fact we present the following suggestions as to the law:

It is not the duty of the appellate court to determine whether or not a verdict of guilty should have been returned, but, on the contrary, the true rule is that if there were any competent evidence at all to sustain the verdict it should be sustained.

Cohen vs. U. S., 214 Fed. 23, 27;
Hedderly vs. U. S., 193 Fed. 561;
Myers vs. U. S., 223 Fed. 919, 925;

Wilson vs. U. S., 190 Fed. 427, 438.

In a conspiracy case it is not necessary to prove that the conspirators at some designated time all got together and specifically agreed to do certain designated things in a designated manner and at a stipulated time.

U. S. vs. Cassidy, 67 Fed. 698;
Thomas vs. U. S., 156 Fed. 897, 912.

It is sufficient that if at any time prior to the commission of the several overt acts the minds of the parties or any two of them met understandingly upon one or more of the different wrongful and unlawful things that were to be accomplished.

U. S. vs. Cassidy, supra;
U. S. vs. Newton, 52 Fed. 275, 280;
Olson vs. U. S., 133 Fed. 849, 854, 855;
Wilson vs. U. S., 190 Fed. 427, 436;
Mitchell vs. U. S., 196 Fed. 874, 877.

It was not necessary that the conspirators should even know who their co-conspirators were or be acquainted with them.

U. S. vs. Barrett, 65 Fed., 62, 63;
U. S. vs. Cassidy, 67 Fed., 698;
U. S. vs. Newton, 52 Fed., 275, 286.

It was not necessary that every conspirator in order to be bound should know the exact part that each of his co-conspirators was to perform.

U. S. vs. Cassidy, supra;
U. S. vs. Newton, 52 Fed. 275, 282;
U. S. vs. Barrett, 65 Fed. 62, 63.

A conspiracy is generally proven by circumstantial evidence and the law never commands the impossible.

U. S. vs. Newton, 52 Fed. 275, 284;
Farmer vs. U. S., 223 Fed. 903, 907;
Olson vs. U. S., 133 Fed. 849, 854;
Thomas vs. U. S., 156 Fed. 897, 910;
Davis vs. U. S., 107 Fed. 753, 755.

Applying then these rules of law to the above mentioned propositions of fact we contend for them that the evidence was sufficient to go to the jury upon the question of whether or not Gernert was a member of the conspiracy and should be bound by the acts of his co-conspirators. The question was submitted to the jury under proper instructions of the court in which every safeguard was thrown around the defendant Gernert; under such circumstances, the jury having found against him, the action of the jury is final and conclusive and should not be disturbed on appeal.

We have advanced these propositions of law for the purpose of showing to the court that under the law and the fact the verdict should not be disturbed, but we would be willing to go much further than this and to state with assurance to the court that the above mentioned propositions of fact present a case under which no intel-

ligent jury could have done otherwise than to have returned a verdict of guilty. In the case of Wilson vs. United States, 190 Fed. 427, the court said:

> "A court may almost take judicial notice of the fact that the stock of a corporation selling for twice its par value does not require the payment of such a commission to dispose of it. If it doesn't the selling price must be altogether artificial. The inference must be either that the company is fraudulent if the commission is not excessive or that the commission is fraudulent if the company is what it purports to be." (p. 439)

In the case at bar the stock was not only selling at twice its par value but at three times its par value and under the terms of the conspiracy it was to be sold at five times its par value. The stock was purely speculative and the commission paid to the salesmen and to the president and general manager totaled fifty per cent of the individual and total amounts of the several sales.

Again, as was held by the Circuit Court of Appeals of the second circuit, in the case of Myers vs. United States, 223 Fed. 919:

> "A man who plans to dispose of his individual stock to another by representing that it is treasury stock, so that the purchaser will suppose that the money he pays for it will pass directly to the company, instead of going into the seller's pocket, has

> devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor; and it makes no difference under this statute what he does with the proceeds of his fraud, the devising of the scheme is enough—plus, of course, the use of the mails."

This proposition is also in the case at bar and is one of the things that the defendant Gernert did a great many times.

Counsel for plaintiff in error in the argument in his brief on these assignments of error starts out with the false premise that the gist of the crime charged was a scheme to sell worthless stock by means of glittering representations of fact and promises of profits. He then concludes that unless there was a guilty knowledge on the part of Gernert proven, that such stock was worthless, there could be no conscious participation in the conspiracy and no attempt to defraud, and that this is the one point which the United States must establish beyond a reasonable doubt and by competent evidence. We have detailed in our brief the testimony of various witnesses, and the exhibits admitted in evidence, which show that Gernert was very closely associated with LeMonn and Menefee, and had a secret understanding with them, which he did not even reveal to Muraine, the salesman under him, whereby he was selling the personal stock of

himself, Menefee and LeMonn upon representation to purchasers that it was the treasury stock of the company and that the money paid therefor would go into the treasury of the company. The evidence shows that he did this deliberately, that he collected his profits from these false representations, and that he knew that the stock which he was selling as treasury stock was not such. It is also shown that he received and sent numerous letters through the mail, and that he was connected with the company and with the other defendants in a business which, he must have known, as anyone would have known, it was impossible to carry on without the use of the mails. Having in mind that the conspiracy as alleged was that the defendants had agreed to sell the stock of the Cashier Company by the use of false representations, pretenses and promises, and to use the mails in furtherance and in execution of said scheme, how can it possibly be said that Gernert was not a member of this conspiracy? There was surely enough evidence to go to the jury, for them to say whether or not he was a member of this conspiracy. In this connection the argument of counsel goes on the assumption that all of the various means of carrying out the conspiracy, that is, false representations as to patents, manufacture and sale of machines, financial condition, etc., were necessary parts of the conspiracy instead of means to carry it out, and would have to be brought to the knowledge of Gernert. As shown by the authorities above cited, it is not

necessary for each conspirator to know who all the others were, or to know the exact part which each was to perform. Plainly, Gernert's part in the conspiracy, or agreement to sell the capital stock by false representations, was to sell the private stock of the officers of the company upon presentation that it was treasury stock, and that the money paid therefor would go into the treasury of the company. It is plain that he had guilty knowledge of the falsity of the representations which he made in this respect. Whether or not he knew of the falsity of some of the other representations which were to be used as a means for carrying out the conspiracy is immaterial, although we contend it may be fairly presumed from an inspection of the record that he know of the falsity of these representations as well. The cases cited by counsel for appellant in support of his argument in this connection are directed to the proposition that the criminal intent must exist in the mind of the defendant before he can be said to be guilty of the crime charged. As a legal proposition, this is undoubtedly true, but how can it be said to have application where a man who, like Gernert, joined with others in selling stock in a corporation at double its par value and more upon the deliberately false representation that it was treasury stock of the company, and that the money paid therefor would go to increase the assets of the company and its earning power, where he knew at the time that this money would go into the pockets of himself and his part-

ners in crime—how, we say, could a man who did these things claim that he had no criminal intent.

7. ASSIGNMENTS OF ERROR NUMBERED VIII, IX AND X present the question as to the statute of limitations and the contention that the conspiracy, if there was any, was terminated and completed more than three years prior to the filing of the indictment; that none of the overt acts appearing in the indictment were committed prior to the termination of the conspiracy and effectuating its said object; that Gernert was not associated with the conspirators named in the indictment nor employed by the United States Cashier Company within three years of the finding of the indictment.

We have fully discussed the law applicable to these questions in our argument herein as to assignment of error No. III.

Inasmuch as these three assignments may be so easily grouped, they will be considered together.

The indictment was returned and filed on the 27th day of February, 1915 (Transcript of Record, p. 99).

The indictment alleged, (Transcript of Record, p. 28) and the proof showed (Transcript of Record, p. 125) that the said conspiracy should, would and did continue from a date on or about September 1, 1910, down to and including January 1, 1915, and that during all

of said times and between all of said times, the said conspiracy was in continual existence and in process of execution and that during all of said times and between all of said times the said conspirators continued to conspire together to commit the acts in the indictment set forth in detail.

It is certified in the bill of exceptions that Bonnewell, Todd, Campbell, Menefee and LeMonn were parties to said conspiracy, and we have shown by the proof that Gernert was also a member thereof and bound thereby.

The indictment alleges that overt act No. I was committed on February 6, 1914 (Transcript of Record, p. 30).

That overt act No. II was committed on July 23, 1912 (Transcript of Record, p. 32).

That overt act No. III was committed on June 7, 1912, (Transcript of Record, p. 37).

That overt act No. IV was committed on January 30, 1913, (Transcript of Record, p. 46).

That overt act No. V was committed on March 27, 1912, (Transcript of Record, p. 50).

That overt act No. VI was committed on March 28, 1912, (Transcript of Record, p. 53).

That overt act No. VII was committed on August 19, 1912, (Transcript of Record, p. 58).

That overt act No. VIII was committed on February 29, 1912, (Transcript of Record, p. 65).

That overt act No. IX was committed on July 24, 1912, (Transcript of Record, p. 68).

That overt act No. X was committed on March 5, 1912, (Transcript of Record, p. 74).

That overt act No. XI was committed on March 5, 1912, (Transcript of Record, p. 77).

That overt act No. XII was committed on April 8, 1912, (Transcript of Record, p. 83).

That overt act No. XIII was committed on April 7, 1912, (Transcript of Record, p. 89).

That overt act No. XIV was committed on August 27, 1912, (Transcript of Record, p. 94).

That overt act No. XV was committed on May 19, 1912, (Transcript of Record, p. 96).

That overt act No. XVI was committed on June 5, 1912, (Transcript of Record, p. 97).

The proof showed:

> "And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee, and F. M. LeMonn committed each, every and all of the overt acts that are mentioned, specified and stated in

the indictment in the manner and at the several times and places respectively alleged and stated in said indictment." (Transcript of Record, p. 128).

Thus, it is clear that each, every and all of the overt acts alleged and proven were committed subsequent to February 27, 1912, and within three years prior to the date of the filing of the indictment.

But it is contended that the defendant Gernert if a member of the conspiracy at all was not a member of such conspiracy after January 1, 1912.

We believe the law to be well settled that if a man be a member of a conspiracy that in order to relieve himself from the consequences thereof, he having set evil forces at work, must by some voluntary act of his own, withdraw from the conspiracy; otherwise he is to be bound by all subsequent acts.

Hyde vs. U. S., 225 U. S. 347 at 369.

But we believe that there is abundant testimony to show that Gernert was a member of the conspiracy subsequent to February 27, 1912.

The proof in this connection showed (Transcript of Record, p. 106) that Gernert was the assistant sales manager of the company until January 1, 1912. We have shown that Menefee was a member of the same conspiracy; on May 16, 1912, Menefee wrote a letter to

Gernert (Government's exhibit No. 66, Transcript of Record, p. 107), a careful reading of which letter shows that the president of the company was, on May 16, 1912, giving explicit directions to Gernert as to how he should proceed with the sale of the corporate stock of the United States Cashier Company as its agent; this letter (Government's exhibit No. 66) Gernert, through his counsel, at the trial admitted that he had received.

Government's Exhibit No. 242, being a letter of date July 12, 1912, written by Gernert to C. B. Clark (Transcript of Record, p. 150) was of and concerning the stock purchased by Mr. Clark from Mr. Gernert.

The conversation detailed by the witness Clark with Mr. Gernert took place at Portland, Oregon, in June, 1912 (Transcript of Record, p. 150).

Gernert received $2500.00 from Clark on account of this stock transaction on August 9, 1912 (Transcript of Record, p. 154). It was on February 27, 1912, that Gernert wrote his fraudulent letter (Government's Exhibit No. 288, Transcript of Record, p. 173) to his co-conspirator LeMonn, and it was on March 2, 1912, that LeMonn wrote his co-conspirator Gernert the fraudulent reply requested by Gernert (Transcript of Record, p. 175).

The correspondence set out at pages 178 to 188, inclusive, is all dated subsequent to February 27, 1912. Many of the telegrams set out at pages 193 to 195, inclu-

sive, of the transcript of record, are all dated subsequent to February 27, 1912, and the same is true of the telegram set out at page 196 of the transcript of record. We also quote from the transcript of record at pages 226 and 227:

> "The records of the company show that on December 30, 1911, a credit was made to Mr. Gernert's account on the books of the United States Cashier Company for $375.00, with the notation that it is for salary and expenses for five weeks from November 25, 1911, to December 30, 1911. Said records further show that on January 4, 1912, the company paid Gernert $83.34 in cash. On January 12, 1912, $250.00 in cash. On February 5, 1912, $25.00 in cash. On February 8, 1912, $75.00 in cash. On February 10, 1912, $150.00 in cash. On April 11, 1912, $100.00 in cash. On May 8, 1912, $100.00 in cash. On May 25, 1912, $100.00 in cash. On June 11, 1912, $50.00 in cash. On July 2, 1912, $50.00 in cash. Making a total payment in cash of $983.34, subsequent to December 30, 1911. Mr. Gernert's account was credited with $513.60 on account of commissions. This would make a payment to Mr. Gernert of $469.74 more than his commissions. In compiling these figures I have not taken into consideration any commission that Mr. Gernert might have made from the sale of private

stock; the records of the company further show that the company has paid to Mr. Gernert in cash a total of $8170.56 during the years 1910, 1911 and 1912; that the account was opened about the 1st of April, 1910. In these figures I am not taking into consideration any sums of money or any property that Mr. Gernert may have received on account of the sale of any personal stock either belonging to himself or anybody else, and these figures are exclusive of all amounts that Mr. Gernert may have received as commissions on the sale of private stock. In reference to the statements made in Government's Exhibit 295, being a letter from LeMonn to Gernert, the books and Records of the United States Cashier Company show that on February 10, 1912, the company paid to Mr. Gernert $150.00; the next date, February 21, 1912, $250.00, does not appear on the company's books; the only payment mentioned in said letter which appears upon the company's books is the first entry of date February 10, 1912, for $150.00. The books and records of the United States Cashier Company further show that at this time Mr. Gernert is indebted to the company in the amount of $1439.27. The last entry made in the account was on the 28th day of February, 1913, being a credit for seventy-five cents commission.

Cross examination by Mr. Maguire.

> The payments that were made in February, March, April, May and June to Mr. Gernert were advances to Mr. Gernert. During this time there were credit commissions that were made to him. These were commissions for stock that had been sold prior to February, 1912. The commission would not be credited until the stock was paid for, notwithstanding the date of the sale." (Transcript of Record, pp. 226, 228.)

In addition to this, Menefee, testifying in aid of Gernert (Transcript of Record, p. 274) said that he did not think Mr. Gernert did any work *particularly* for the company after the 1st day of January, 1912, which would indicate that he did some work after that date, while one of the letters introduced in evidence by the defendant (Transcript of Record, p. 269), is dated subsequent to February 27, 1912.

Counsel for the appellant seems to rely upon the theory that if Gernert was not the assistant sales manager of the company subsequent to January 1, 1912, he could not be a member of the conspiracy. Our answer to this is that he continued to be a member of the conspiracy even if we could concede that on January 1, 1912, he ceased to hold an office in the company which he had held prior to that date.

8. ASSIGNMENTS OF ERROR NUM-

BERED XI TO XIX, inclusive, are all based upon the action of the court in refusing to give nine separate instructions to the jury.

Assignment of error No. XI is based upon the refusal to give the following instruction to the jury:

> "Again, even though you should find from the evidence that fraud or injury resulted from the acts of one or more of the defendants and was brought about or executed in whole or in part by use of the mails, yet, if you would not find that there was an agreement or understanding between the defendants and all of them to devise such a scheme and to execute it in the manner hereinbefore alleged, then you must find the defendants not guilty."

Upon this question the court did instruct the jury as follows:

> "It must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States." (Transcript of Record, p. 287).

And the court also instructed the jury as follows:

> "Therefore, even though you should find that the defendants did agree together to devise a scheme to defraud, it would not be sufficient to justify their conviction unless it also appears that

> it was a part of such conspiracy that the United States mails should be used for executing it. And even if injury resulted from the acts of one or more of the defendants brought about and executed in whole or in part by the use of the mails, it would not justify a conviction of such defendant or defendants unless it further appeared that the original agreement or understanding contemplated the use of the mails in furtherance of their given purpose." (Transcript of Record, pp. 297, 298).

There were other instructions given by the court equally applicable but the foregoing are sufficient to show that the requested instruction was given almost in the exact language and at least to the same effect as the instruction requested. It is perfectly proper for the trial court, in delivering its charge to the jury, to reframe the requested instructions and to use its own language so long as the general import of the requested instruction, if proper, be given.

Assignment of error No. XII is based upon the action of the court in refusing to give the following instruction to the jury:

> "Gentlemen of the Jury: You are further instructed that it is not sufficient for the government in this case to show that certain of the defendants combined to perform certain acts and

some one or more combined with others to perform different acts, even though the defendants had a similar purpose in view, but the evidence in this case must show beyond a reasonable doubt that each and all of the defendants agreed and conspired together to do these things."

The court, in dealing with this phase of the question, instructed the jury in part as follows:

"Each party to a conspiracy must be actuated by the intent to promote the common design, but he may perform separate acts, or hold distinct relations, in promoting such design." (Transcript of Record, p. 289.)

And the court also instructed the jury as follows:

"While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged." (Transcript of Record, p. 289).

And the court also instructed the jury as follows:

> "First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore, there must be at least two persons acting together in order to constitute a conspiracy."

(Transcript of Record, p. 287).

And the court also instructed the jury as follows:

> "One cannot be made a member of a conspiracy except by his own conscious act and not by the acts and declarations of another." (Transcript of Record, p. 291).

Assignment of error No. XIII is directed against the action of the court in refusing to give the requested instruction set out in full at page 359 of the transcript of record. A careful reading of this requested instruction shows that it is long and involved. Considering the request as a whole, the propositions of law therein stated are erroneous and could not have had any other effect than to have misled the jury. By this request the court is asked to say to the jury that in order to convict the defendants it would be necessary for the jury to find, beyond a reasonable doubt,

(a) That the defendant had an intent to defraud; and

(b) That he had knowledge that the company did not own the patents; and

(c) That he knew the company did not intend to manufacture machines; and

(d) That he knew that the company did not have bona fide orders for its machines; and

(e) That he knew the company would not make large profits; and

(f) That he knew that the corporation was insolvent and its liabilities exceeded its assets; and

(g) That by reason of all of these things he also knew that the stock was worthless.

In other words, if the defendant, under this request, knew all of these things except one of them he could not be convicted. Of, if he knew of all of these conditions and was selling stock at $30.00 per share upon a representation that it was worth that amount knowing that it was only worth $5.00 per share, he could not be convicted because he would not know that it was absolutely worthless.

All of the requested instruction that was proper and applicable to the facts was given by the court, as will be shown by a reference to pages 313 and 314 of the transcript of record.

Assignment of error No. XIV is directed against the action of the court in refusing to give the requested instruction set out at page 360 of the transcript of record. The requested instruction does not state the law;

if it had been given the jury would have been instructed that before the defendant could be convicted the jury would have to be satisfied that the defendant knew that the stock he was offering for sale was absolutely worthless; under the request, even if he had made false and misleading statements in order to sell the stock at $30.00 per share, knowing it to be worth but $5.00 per share, and had made all of the false statements charged in the indictment, he could not be convicted if he believed that the stock had any value whatsoever. Under such a proposition of law it would be impossible for any person to violate the postal fraud statute.

Assignment of error No. XV is directed against the action of the court in refusing to give to the jury the requested instruction set out at page 361 of the transcript of record. The statement contained in the request to the effect that there is no difference between company stock and personal stock is misleading and is not the law. A man who purchases the stock of a corporation upon a representation that the money he pays is to go into the treasury of the company has been defrauded when that money is wilfully diverted into the pockets of the agent who made the sale. To illustrate, a man purchases stock in a corporation and pays $10,000 for it upon the representation that this sum of money is to be used by the company for the purpose of building factories. Thus, he has the right to believe that this money which he is paying for the sale of the stock will be used

in such a way as to increase the dividends on the stock which are promised to be paid to him. Under such circumstances, if the money is diverted and the company receives no benefit from the transaction then the stockholder has been defrauded.

That portion of the instruction applicable and which states the law was given by the court, as is shown on page 316 of the transcript of record wherein the court instructed the jury:

> "It is claimed as against both Gernert and Todd that they sold private stock, representing it to belong to the company and that the money derived therefrom would go into the treasury of the company, when in truth and in fact they appropriated the money to their own use, and the stock belonged to parties other than the corporation. Now, neither of these acts would constitute a crime within this indictment, unless you believe from the testimony, beyond a reasonable doubt, that these gentlemen knew of the alleged conspiracy, and that it was a part of such conspiracy that private stock should be sold as the stock of the corporation and upon a representation that the money derived therefrom should go into the treasury of the company." (Transcript of Record, p. 316).

Assignment of error No. XVI is directed against

the action of the court in refusing to give the requested instruction set out at pages 361 to 362 of the transcript of record.

By this request the court was asked to say to the jury that it was no evidence of fraud against the agents if it should be established that they had received a large commission; this was a question of fact for the jury to determine for which reason alone the requested instruction was not proper. Under such an instruction there would be no presumption of fraud against an agent selling stock in a corporation at three times its par value and receiving a commission of ninety-nine per cent upon the sale. In the case under consideration the commission paid was fifty per cent and in the *Wilson case* hereinbefore quoted, the Circuit Court of Appeals of the second circuit held that *the court would almost take judicial knowledge that such a commission was fraudulent.*

That portion of the instruction applicable and proper was given by the court as is shown by reference to pages 312, 313 and 316 of the transcript of record.

Assignment of error No. XVII is directed against the action of the court in refusing to give the following instruction to the jury:

> "There is no presumption from the fact that a statement is false that it is made with a fraudulent intent."

This principle of the law so far as applicable and proper is contained in almost every instruction given by the court. It was stated to the jury so many times and in so many different ways for the benefit of these defendants that a citation to the record upon this point would make it necessary to almost set out the entire charge.

In support of this requested instruction which it is claimed should have been given in the identical language as was requested, the case of Southern Development Company vs. Silva, 125 U. S. 248, was cited. A careful reading of this case shows that the Supreme Court held in effect that statements of fact, to be fraudulent, must have been knowingly made and knowingly false; this proposition of law was stated by the court many times in its instructions.

Assignment of error No. XVIII is directed against the action of the court in refusing to give to the jury the instruction set out at page 363 of the transcript of record. What we have heretofore said relative to Assignment of error No. XVII is applicable to and covers fully this requested instruction.

Assignment of error No. XIX is directed against the action of the court in refusing to give to the jury the requested instruction set out at page 363 of the transcript of record.

A reference to page 312 of the transcript of record shows that this requested instruction was given by the court to the jury in the identical language of the request.

Under such circumstances it is difficult for us to believe that the assignments of error based upon the refusal to give these requested instructions are made by counsel for the appellant seriously.

As to each, every and all of these assignments of error directed against the action of the court in refusing to give certain requested instructions to the jury, it is our contention that it was within the province of the court to frame its own instructions in its own language and that if taking the charge as a whole the jury were correctly instructed as to the law, then it cannot be held that there was error.

9. ASSIGNMENTS OF ERROR NO. XX TO XXX, inclusive, are all based upon the action of the court in giving eleven instructions to the jury, and as these are all readily classified, we will treat of them altogether.

Assignment of error No. XX is based upon the action of the court in giving to the jury the instruction set out at page 364 of the transcript of record. This instruction, when read either separately or taken in conjunction with all of the other instructions given by the court, clearly states the law.

Assignment of error No. XXI, XXII, XXIII, XXIV and XXV are all based upon the action of the court in giving to the jury instructions to the effect that if the defendants knowingly made false and fraudulent representations knowing them to be untrue for the purpose of deceiving the investors and the public as to the true conditions and value of the stock, that the law would imply an intent to defraud.

We have heretofore elaborately advanced to the court our theory of the law relative to these instructions and the principles involved therein. This we did in the brief heretofore filed by us in the case of Menefee vs. United States, which case was argued before this court on May 8, 1916. A copy of our brief in the Menefee case has been served upon counsel for the appellant in the case at bar. Our argument upon these propositions of law presented by these assignments is set out at pages 110 to 170 of our brief in the Menefee case and we can see no good reason for repeating that argument here.

We might add, however, that much of our argument in the brief in the case at bar dealing with the question as to whether or not the evidence against Gernert was sufficient to justify the verdict and the quotations from the many exhibits contained in that argument are applicable for the purpose of showing upon the part of Gernert a clear intent to defraud the public.

Assignment of error No. XXVI is directed against

the action of the court in giving to the jury the instruction set out at page 369 of the transcript of record.

When this instruction is read either separately or in conjunction with all of the other instructions given by the court, we contend for it that it contains a clear, fair and concise statement of the law.

Assignment of error No. XXVII is directed against the action of the court in giving to the jury the instruction set out at page 370 of the transcript of record.

What we have heretofore said relative to assignments numbered XXI and XXV, inclusive, is applicable to this assignment.

Assignment of Error No. XXVIII and XXIX are directed against the action of the court in giving to the jury instructions set out at pages 370, 371 and 372 of the transcript of record. Our position as to both of these assignments of error is that when these instructions are read, either separately or in conjunction with all of the other instructions of the court, it is readily seen that they contain a clear, concise and fair statement of the law as applicable to the facts.

Assignment of error No. XXX is directed against the action of the court in giving to the jury the instruction set out at page 372 of the transcript of record.

This instruction is supported by what we have had to say hereinbefore with respect to continuing conspiracies.

Brown v. Elliott, supra;
Kissel v. U. S. supra;
Hyde v. U. S. supra.

That a conspiracy such as presented in the case at bar may be continuous is settled beyond doubt by these authorities.

The exceptions to instructions given and refused to which errors were assigned by plaintiff in error, assignments XI to XXX inclusive, are treated together in his brief. He contends in argument that the very cornerstone of the Government's case must necessarily be that defendants knew that the capital stock of the company was or would be worthless, and yet entered into a campaign for its disposal. It is claimed that Gernert did not know that the stock was worthless, and that being so, the case against him must fail, the argument being on the assumption that knowledge as to the falsity of all the representations, which it is alleged in the indictment were to be made by the defendants as to the patent situation, the financial condition of the company, and the boosting of the price of stock, must be brought home to Gernert.

Counsel here is again arguing beside the point. The indictment charges a conspiracy between the defendants to sell stock of the company by false representations, assurances and promises, and to use the mails in execution of their scheme. The indictment further alleges that misrepresentations as to the patent situation of the com-

pany, its financial condition, as to the amount of their product that they were manufacturing, as to the value of the stock, and as to whether the stock sold was treasury stock or personal stock, were various means to be used by the conspirators in carrying out the scheme alleged. As alleged and proven, one of the means of carrying out the scheme was the selling of personal stock of some of the defendants upon representation that it was treasury stock, and that the money paid therefor would be used by the company in building factories and manufacturing machines, and otherwise furthering its business. As has been shown heretofore in the argument as to the sufficiency of the evidence against Gernert, the use of this particular means of carrying out the conspiracy was employed time and time again by Gernert; in fact, it is quite plain that that was his particular part in the conspiracy. It is settled law that each member of the conspiracy may have a different part to play in the same. One may have a major part, the other only a minor part to perform. Each conspirator may not necessarily know what part the other is to perform. It is only necessary that each of the conspirators be actuated in a tacit agreement or understanding for the promotion of the common design.

Hyde v. U. S., 225 U. S. 347, 367;
Wilson v. U. S., 190 U. S. 427, 436.

Counsel further argues as to these instructions that

they took away from the jury the question of intent. As we have said before, this question has been fully discussed in our brief in the Menefee case, pages 110 to 170.

We have chronologically dealt with each, every and all of the assignments of error as they are presented and it is our contention that no prejudicial error has been committed against this defendant; we recognize that many of the propositions of law contended for by counsel for the appellants will probably be discussed and considered by the court in the Menefee case argued before this court on May 8, 1916, to the end that an extended discussion of many of these propositions could serve no useful purpose at this time.

CONCLUSION.

As we have hertofore indicated in this brief the only assignments of error which deserve serious consideration at the hands of the court are those directed against the action of the court in refusing to instruct a verdict of not guilty upon the ground that the evidence was insufficient to justify a verdict of guilty. These assignments of error become important for two reasons:

First: If the defendant Gernert were not a member of the conspiracy, then the evidence to which objection was made would be inadmissible as against him and its admission would be error. On the other hand, if he were a member of the conspiracy, then he would be bound to the same extent as the other conspirators; and,

Second: Whenever any defendant contends that the evidence against him is not sufficient, it becomes the duty of the court to carefully analyze all of the evidence for the purpose of ascertaining whether or not the claim is well founded.

In this case the court is asked to believe that notwithstanding the formation and long duration of this conspiracy to swindle the public out of $1,500,000 established by evidence to the effect that the swindle had

been accomplished for the purpose of so defrauding the public, that there was one man connected with the enterprise whose duty it was "to train all the other salesmen;" whose title appearing upon the letterhead, by his own representations, and in the printed literature of the company was that of assistant sales manager, who sold his own personal stock and that of Menefee and LeMonn in amounts running up into thousands of dollars upon the false representation that the money was to go into the treasury of the company for the purpose of building factories, when he knew that it was to be divided between himself and Menefee; who wrote the fraudulent letter set out at page 173 of the transcript of record in which practically every fraudulent part of the conspiracy was dealt with, and treated as a joke; who was permitted by the company to have an overdraft of $1439.27; who was, during the greater portion of the existence of the conspiracy, a willing agent in causing a large number of men to part with their money, and to give them in exchange therefor worthless securities, was the one man, who by deliberately shutting his eyes and closing his ears to all of the evidence of fraud around him rendered it impossible for him to either know or realize that anything that he was doing was either wrong or fraudulent.

We do not believe that under these circumstances this court is called upon or should be asked to give to these facts any other than a broad construction.

We think the court justly and rightly allowed the jury to determine from this evidence whether or not Gernert was a member of the conspiracy.

Bettman v. U. S., 224 Fed. 819, 827, 828.
Kaplan v. U. S., 229 Fed. 389.

We do believe that in considering this important question and in determining as to what the judgment of this court should be that the principles of common honesty and fair dealing expressed in the Wilson case are clearly applicable here, and we close with this reference from the decision of the court in that case, affirming the judgment of conviction.

> "It should reach far beyond them and serve as a warning to that vast crowd of speculators, promoters, gamblers and adventurers who pose as men of business and affairs and carry on their operations in the borderland between legitimate undertakings and criminal schemes. It ought to bring home to their understanding that the misappropriation of other people's money is not distinguished from larceny by designating the process a great corporate enterprise; that inducing hundreds of men and women to part with hundreds of thousands of dollars for worthless securities calls for condemnation just as much as cheating in the sale of a single musical instrument or photograph album; that after all there

is no merit in wholesale knavery over cheap tricks or in gilded devices over barefaced swindles, and, furthermore, that neither swindlers of high degree nor cheats of low station can employ with impunity the mails of the United States in aid of their fraudulent schemes."

Respectfully submitted,

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